

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0206

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KATHAN DEVERNON JOHNSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Michael G. Moses, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
KATIE F. SCHULZ
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
kschulz@mt.gov

SCOTT D. TWITO
Yellowstone County Attorney
JACOB YERGER
Deputy County Attorney
P.O. Box 35025
Billings, MT 59107-5025

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

CHAD WRIGHT
Appellate Defender
MICHAEL MARCHESINI
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF THE ISSUE..... | 1 |
| STATEMENT OF THE CASE..... | 1 |
| STATEMENT OF THE FACTS | 2 |
| STANDARD OF REVIEW | 13 |
| SUMMARY OF THE ARGUMENT | 14 |
| ARGUMENT | 15 |
| The district court was presented with sufficient “records and recollections of violations” to deny elapsed time credit | 15 |
| CONCLUSION | 19 |
| CERTIFICATE OF COMPLIANCE..... | 20 |

TABLE OF AUTHORITIES

Cases

| | |
|--|------------|
| <i>State v. Gudmundsen</i> , 2022 MT 178, 410 Mont. 67, 517 P.3d 146 | 17 |
| <i>State v. Jardee</i> , 2020 MT 81, 399 Mont. 459, 461 P.3d 108 | 13 |
| <i>State v. Johnson</i> , 2022 MT 216, 410 Mont. 391, 519 P.3d 804 | 13, 16, 17 |
| <i>State v. Kotwicki</i> , 2007 MT 17, 335 Mont. 344, 151 P.3d 892 | 13 |
| <i>State v. Pennington</i> , 2022 MT 180, 410 Mont. 104, 517 P.3d 894 | 17 |
| <i>State v. Tippetts</i> , 2022 MT 81, 408 Mont. 249, 509 P.3d 1 | 13 |

Other Authorities

Montana Code Annotated

| | |
|-------------------------|--------|
| § 46-18-203(7) | 19 |
| § 46-18-203(7)(b) | 15, 16 |

STATEMENT OF THE ISSUE

Whether the district court correctly concluded Johnson was entitled to only ten days of elapsed time credit when Johnson had been arrested and charged with seven new offenses and never entered an anger management program, a specific condition of his sentence.

STATEMENT OF THE CASE

Kathan Devernon Johnson pled guilty to felony strangulation and Partner/Family Member Assault (PFMA). (Doc. 14.) The court imposed a net, five-year suspended sentence to the Department of Corrections (DOC) and granted Johnson seven days of actual credit for time served. (Docs. 16, 18.)

Johnson's suspended sentence was revoked when he absconded from probation. (Docs. 31, 32.) On May 21, 2020, the court reimposed a 4-year, 357-day commitment to DOC, all suspended. (*Id.*) The court granted Johnson credit for 1 year of elapsed time and 5 days credit for actual time served. (*Id.*)

Ten days after disposition, and continuing for the next two years, Johnson was charged in five district court cases with seven different offenses. (Docs. 33, 34, 52, 53, 84, 97.) The State petitioned to revoke Johnson's suspended sentences and filed two amended petitions. (*Id.*) The State also filed several petitions to

revoke Johnson's release for failing to abide by the conditions of release pending resolution of his revocation proceeding. (Docs. 40, 48, 62, 64.)

Following testimony from Johnson's probation officer (PO), Sean Pisk, the court revoked Johnson's suspended sentence for failing to report his arrests/contact with law enforcement and conduct himself as a good citizen. (12/22/22 Tr. (Tr.)) At disposition, the court sentenced Johnson to the DOC for a term of 2 years and 352 days, with all but 1 year suspended. (1/26/23 Tr. (Hr'g) at 22.) The court granted Johnson 10 days of elapsed time credit (5/21/20 to 5/31/20) and 441 days of credit for actual time. (Hr'g; Doc. 103.)

STATEMENT OF THE FACTS

On February 7, 2018, Johnson assaulted his wife by pushing her down, grabbing her by the throat, and preventing her from breathing for several minutes. (Doc. 1.) Johnson was arrested and charged with Count I, felony strangulation; Count II, misdemeanor PFMA; Count III, misdemeanor criminal destruction/tampering with communication device; and Count IV, misdemeanor unlawful restraint. (Docs. 1-4.) Johnson posted bond on February 14, 2018. (Doc. 9.)

Pursuant to a plea agreement, Johnson pleaded guilty to Counts I and II and the other two counts were dismissed. (Docs. 14, 15.) On November 20, 2018, the

court sentenced Johnson as follows: for Count I, a 5-year DOC commitment, all suspended; and for Count II, a concurrent 12-month period of incarceration with all but 3 days suspended. (Docs. 16, 18.) Based on Johnson's 7 days of presentence incarceration (2/14/18 to 2/14/18), the court explained that if Johnson's sentence was later revoked, the maximum sentence he could receive was 4 years, 357 days. (*Id.*) The court imposed several conditions including that Johnson remain law abiding, report any arrest or contact with law enforcement to his PO, cooperate and be truthful with law enforcement and his PO, and conduct himself as a good citizen. (*Id.*; Condition No. 9.) The court also ordered Johnson to enter and complete an anger management program "to assist in dealing with his[] violent criminal behavior." (*Id.*; Condition Nos. 32, 33.)

On December 24, 2019, the State petitioned to revoke Johnson's suspended sentence alleging that he violated his sentence by not attaining employment; not living at his reported residence; failing to report; and absconding. (Docs. 20, 21.)¹ Johnson's probation officer recommended that Johnson not receive any street time credit. (*Id.*) Johnson turned himself in on December 26, 2019. (Doc. 33; 12/22/22 Tr. at 10.) After his initial appearance on December 31, 2019, the court released Johnson on his own recognizance (OR). (Docs. 23, 24.)

¹Johnson also had a DUI in late November 2019, for which the DOC imposed informal sanctions. (Doc. 20; Hr'g at 12-13, 15.)

At the May 21, 2020 revocation hearing, Johnson admitted violating his suspended sentence. (Docs. 31-32.) The court reimposed the 4-year, 357-day DOC commitment, all suspended. (*Id.*) The court granted Johnson credit for 1 year of elapsed time (11/18/18 to 11/18/19) and 5 days credit for actual time served (12/26/19 to 12/31/19). (*Id.*)

Ten days after being sentenced, Johnson assaulted his current partner. (Doc. 33.) Johnson was charged in Cause No. DC-20-1086 with aggravated assault and was arrested for that offense on August 24, 2020. (*Id.*) Pisk saw Johnson's name on the jail roster and, after reviewing the police reports about the assault, filed a Report of Violation (hereinafter ROV-1). (Doc. 33; Tr. at 11-12.)

The State petitioned to revoke Johnson's suspended sentence for violating Probation Condition No. 8 for failing to remain law abiding, reporting contact with law enforcement, and conducting himself as a good citizen. (Docs. 33, 34.) Pisk recommended 10 days of elapsed time credit (5/21/20 to 5/31/20). (*Id.*) Pisk explained that Johnson's

adjustment to supervision has been abysmal. This is the second lifetime alleged felony in where the Defendant had committed a violent offense. It appears the alleged victim is another woman the Defendant was intimately involved with. Please note, this Report of Violation is being penned 76 days after having his sentence re-suspended.

(Doc. 33 at 2.)

The court issued a bench warrant for Johnson on August 28, 2020, but it was not served. (Doc. 35.) Johnson had an initial appearance on September 9, 2020, where his bail was set at \$15,000. (Doc. 37.) Johnson posted bail and was released subject to conditions, including GPS monitoring. (Docs. 37, 38.)

On September 23, 2020, Johnson's GPS stopped transmitting because he failed to charge it. (Doc. 40.) The State petitioned to revoke Johnson's bail because his whereabouts were unknown. (*Id.*) The court issued a bench warrant for Johnson on September 24, 2020. (*Id.*) On November 13, 2020, the court reinstated a \$15,000 bail. (11/13/20 Tr.; Doc. 42.) Johnson again posted bail and was released later that day, subject to conditions. (Docs. 43, 44.)

Johnson violated the conditions of his release on November 23, 2020. (Doc. 48.) In February 2021, Johnson violated his suspended sentence by again failing to conduct himself as a good citizen or notifying his PO that he had been arrested on February 19, 2021, after being charged with PFMA, robbery, and sexual intercourse without consent. (Docs. 52-53.) On February 23, 2021, the bondsman who had posted Johnson's bail surrendered him to the jail. (Doc. 54.) The State filed an addendum to the petition to revoke Johnson's release describing Johnson's continued violations. (Doc. 48.)

The State filed an amended petition to revoke Johnson's suspended sentence based on Pisk's February 23, 2021 ROV (hereinafter ROV-2). (Docs. 52-53.) Pisk explained that Johnson's

adjustment to supervision has been non-existent. The Defendant is currently on probation for the strangulation of a partner or family member from a previous relationship. The Defendant, with this most recent reported violation and whom he knew intimately, allegedly beat and recorded the victim while he [was] raping her. After the [] alleged[] assault and rape, the Defendant extorted the victim by forcing her to drive to multiple ATM machines and having the victim withdraw money for his own personal use. To note, the Defendant under DC 20-1086 is facing another felony assault charge in where he allegedly accosted a female whom he was in an intimate relationship with.

(ROV-2 at 2.) Pisk maintained that Johnson should receive 10 days of total elapsed time credit. (*Id.*)

Johnson's revocation proceedings were continued multiple times. (Docs. 56-59.) On September 29, 2021, Johnson was conditionally released on his own recognizance (OR) in this case as well as three other pending cases (Cause Nos. DC-20-1086, DC-20-1547, and DC-21-236). (Doc. 61.) Johnson was required to remain away from designated areas, wear a GPS monitor, and report to his probation officer. (*Id.*) Within two days, Johnson violated the conditions by allegedly entering a prohibited area and the State filed a petition to revoke his release. (Doc. 62.) The court issued a bench warrant on October 12, 2021, but it was not served on Johnson. (Doc. 63.)

It is unclear why or when Johnson was arrested, but he had an initial appearance on October 21, 2021. (Doc. 65.) The court continued the \$50,000 bond amount. (Docs. 65-66.) Johnson's revocation hearing was again continued multiple times. (Docs. 67-68, 72.)

Johnson appeared on December 28, 2021, on the State's petitions to revoke his release in this case and four others (DC-20-1086, DC-20-1547, DC-21-236, and DC-21-1320). (12/28/21 Tr.) The State advised that it had moved to dismiss the petitions to revoke his release in all of Johnson's pending cases except DC-20-1086, and noted that in that case, a third addendum was filed because Johnson had committed a new offense. (*Id.*; Docs. 75, 76.) The court set Johnson's bail for \$100,000 and reinstated the bond he had posted in April 2021, so he could be released. (*Id.*; Doc. 74.) The court dismissed the State's October 2020 petition to revoke Johnson's release and quashed the October 12, 2021 bench warrant. (*Id.*)

Johnson's revocation hearing was continued to April 19, 2022, reset to June 14, 2022, and reset again to July 26, 2022. (Doc. 82.) On June 16, 2022, Johnson was arraigned in Cause No. 22-0720 for felony violation of an order of protection. (Doc. 85; Tr. at 12-13.) On July 12, 2022, Johnson was arraigned in Cause No. DC-22-0805 for assault with a weapon that he had committed while in

jail. (*Id.*) A second addendum to the ROV was filed on July 14, 2022, advising the court of Johnson's new criminal charges. (Doc. 85 (hereinafter ROV-3).)

Johnson was in custody when he appeared for his revocation hearing on July 26, 2022, and the hearing was continued multiple times. (Docs. 87-88, 92, 95.) On December 20, 2022, the State filed a second amended petition to revoke Johnson's suspended sentence, that referenced all three pending ROVs. (Doc. 97.) Just as in the two previous ROVs, Pisk asserted that Johnson should receive 10 days of total elapsed time credit. (*Id.*) Pisk described Johnson's adjustment to supervision as "non-existent," explaining that Johnson was "facing a deluge of new felony offenses that include victim harassment, rape, and assault." Pisk further asserted that Johnson was

a danger to the community with no disregard [sic] to the people he harms. A probationary sentence is not appropriate at this time as it appears the Defendant continues to create victims in the community through violence. With the level of continued violence, the Defendant appears to be engaging in, a placement within a treatment center and/or pre-release is not appropriate.

(ROV-3 at 2.)

Johnson was still in custody when his revocation hearing was held on December 22, 2022. (Doc. 98; Tr.) Pisk testified about Johnson's failure to report when he had been arrested/charged with new offenses. (*Id.*) Pisk testified that since May 2020, Johnson had not conducted himself as a good citizen, noting he had been arrested four different times and charged with six serious felonies

involving violent behaviors. (*Id.*) Pisk acknowledged that five of the six charges had been dismissed and the remaining offense (violation of an order of protection) was amended to a misdemeanor and was set for trial. (*Id.*) Despite those dismissals, Pisk testified Johnson had still violated his sentence by not reporting contact with law enforcement or conducting himself as a good citizen. (*Id.*) Pisk testified that Johnson's repeated behaviors indicated that he could not be supervised in the community. (*Id.*)

The district court took judicial notice of the other Cause Nos. (Tr.) The court explained in DC-20-1086, the State was unable to prove its case because the alleged victim would not cooperate. (*Id.*) The court concluded that Johnson had violated Condition No. 8 regardless of the outcome of the four cases brought against Johnson. (*Id.*) The court explained that "[i]t is pretty straightforward and pretty clear that Mr. Johnson has not been a good citizen. That he has not followed the rules. And that he has violated the rule, including this court and parole [sic] condition number 8." (*Id.* at 33.)

The court observed that the violations were indicative of Johnson's struggle with certain relationships, and they "piled" onto one another. (Tr. at 34-35.) As the court explained,

as a result of those struggles, it's been a real challenge for him and a real frustration for [Johnson] as well. I can see the frustration. I have seen his frustration over the course now almost four years. Mr. Johnson, in trying to deal with appropriate relationships all

starting back in 2018 when he was originally charged and convicted of the strangulation of a partner family member. So it's been a struggle for Mr. Johnson under the circumstance. And I find these are all substantial violations. And as I indicated, they become more substantial as to each violation as they simple are a continuation of the issues that Mr. Johnson has been struggling with since his original conviction in 2018.

(*Id.* at 35.)

After the court revoked his sentence, Johnson became irate and argued with the court and accused the prosecutor of targeting him. (Tr. at 36-39.) Despite the court's multiple directives for him to stop, Johnson did not stop his tirade and he had to be removed from the courtroom. (*Id.*) At the next hearing, Johnson apologized to the court for his outburst. (Hr'g at 6-7.)

At disposition, the State asserted that "[t]he revocable time in this case is two years 352 days, not what is listed in the ROV. They are off a year. That is based upon credit that the [c]ourt gave." (Hr'g at 3.)² The State argued that in the past 2 and one-half years Johnson has demonstrated he could not be supervised in

²This was a misstatement of the available time to revoke. In drafting the ROVs in this matter, Pisk applied the 1 year and 5 days credit to the 4-year, 357-day dispositional sentence and confusingly asserted that Johnson had been *sentenced* to 3 years, 352 days, all suspended, instead of explaining that was the maximum term of incarceration (after credit was applied) Johnson may have to serve should the court revoke the May 21, 2020 disposition. The confusion created by the ROVs was exacerbated when the State erroneously advised the court that the "revocable time" was 2 years, 352 days after mistakenly applying the 1 year of elapsed time to the term alleged in the ROV instead of the term imposed on May 21, 2020. The district court, therefore, improperly believed it could only impose a maximum sentence of 2 years and 352 days, instead of 4 years, 357 days.

the community and requested the court sentence Johnson to the DOC with no time suspended. (*Id.*) The State asserted that Johnson was entitled to 10 days of elapsed time credit and then detailed the specific periods of time that it believed Johnson earned actual credit for time served as follows: 9/9/20 (1 day); 11/10/20 to 11/13/20 (4 days); 2/19/21 to 4/29/21 (70 days); 7/29/21 to 9/29/21 (63 days); 10/15/21 to 12/29/21 (76 days); and 6/14/22 to 1/26/23 (227 days). (*Id.*)

Johnson told the court that “[w]hen it comes to the calculations for street time and time served, [the State’s summary] certainly corresponds with my analysis as well. I would ask the [c]ourt to impose those.” (Hr’g at 5.) Johnson advocated for the court to suspend all, or at least part of, the sentence. (*Id.*)

Prior to imposing sentence, the court spoke with Johnson about whether he had begun an anger management program as ordered in his judgment and sentence:

COURT: Did you ever complete an anger management program?

DEFENDANT: No, sir.

COURT: That was ordered.

DEFENDANT: I know. It was -- I was having a hard time maintaining at that time. You know, and I reported –

COURT: That is reasonably obvious from your record here.

DEFENDANT: Yeah. I reported to my PO though. I checked in with him, like, look I’m having a rough time. I’m trying to get things

going. Things keep falling apart. Your Honor, I can't blame nobody for that but myself 'cause I invited these people into my life.

(Hr'g at 8-9.)

The court determined that Johnson should receive credit for 10 days of street time and every day served in the detention center. (Hr'g at 10.) The court stated there had been "all kinds of noncompliance violations between 2020 and the most recent one in 2022" and found Johnson's

performance on supervision has been abysmal. Has been abysmal. I can't describe it any other way. When that original description was provided to me in 2019, I refused to follow it. I wanted to give you that opportunity. And I have given you that opportunity and did give you that opportunity to do the things that you needed to do and do the right things.

And each and every one of these incidents is of great concern to this Court because they have to do with violence and they have to do with a *lack of anger management*. Yeah, they do. As you take a look at them, they all went away. They got dismissed. But each and every one of them came to fruition because of anger management issues.

And your performance on [December] 22nd concerned me greatly. You were unable to control your anger.

....

You have always been appropriate except for that day. You wouldn't listen to your counsel. You wouldn't listen to me. You wouldn't listen to yourself. Out of control and it was anger. Out of frustration. I get that frustration. Understand that. *But you didn't take advantage of going and finding the tools that you need to address those issues, which is the original concern way back, the original sentencing in late 2018.* Would have made a difference for you, I believe. And it is going to make a difference for you in the future too because you are going to do it.

(*Id.* at 15-17.) The court reiterated that Johnson’s problems with anger and violence were the root issue for his PFMA and strangulation convictions and that this same issue permeated his continued involvement with law enforcement and additional criminal charges. (*Id.*)

The district court sentenced Johnson to the DOC for a term of 2 years and 352 days, with all but 1 year suspended. (Hr’g at 22.) The court granted Johnson 10 days of elapsed time credit (5/21/20 to 5/31/20) and 441 days of credit for actual time as set out by the State. (*Id.* at 10, 22; Doc. 103 at 2.)

STANDARD OF REVIEW

A district court’s decision to revoke a suspended sentence is reviewed for abuse of discretion. *State v. Johnson*, 2022 MT 216, ¶ 12, 410 Mont. 391, 519 P.3d 804 (citing *State v. Jardee*, 2020 MT 81, ¶ 5, 399 Mont. 459, 461 P.3d 108). “Only where a criminal sentence is alleged to be illegal or in excess of statutory mandates will this Court review an issue on appeal. So long as a sentence falls within the statutory parameters the sentence will be regarded as legal.” *Johnson*, ¶ 12 (citing *State v. Kotwicki*, 2007 MT 17, ¶ 5, 335 Mont. 344, 151 P.3d 892).

Since “[c]alculating credit for time served is not a discretionary act, but a legal mandate . . . a lower court’s determination of credit for time served is reviewed [*de novo*] for legality.” *Johnson*, ¶ 14 (citing *State v. Tippetts*,

2022 MT 81, ¶ 10, 408 Mont. 249, 509 P.3d 1). *But see, Jardee*, ¶ 19 (McKinnon, J. concurring) (court exercises discretion when it considers whether there is a record or recollection of violations when denying elapsed time credit).

SUMMARY OF THE ARGUMENT

The district court met its statutory obligation to award elapsed time credit absent a record of violations when it awarded 10 days of credit as recommended by both the State and Johnson. Contrary to Johnson's argument on appeal, the record contains evidence of an actual violation: Johnson's admission that for the entirety of his suspended sentence he had not entered or participated in an anger management program. The court thoroughly explained how Johnson's failure to comply with a condition of his sentence and address this root cause of his original convictions was tied to his continued failure to act as a good citizen and his erratic and aggressive behavior at the revocation hearing. When it awarded 10 days of elapsed time credit and 441 days of actual credit, the district court imposed a legal sentence that was based upon a record containing specific violations of his suspended sentence.

///

ARGUMENT

The district court was presented with sufficient “records and recollections of violations” to deny elapsed time credit.

Pursuant to Mont. Code Ann. § 46-18-203(7)(b),

If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time, consult the records and recollection of the probation and parole officer, and allow all of the elapsed time served without any record or recollection of violations as a credit against the sentence. If the judge determines that elapsed time should not be credited, the judge shall state the reasons for the determination in the order. Credit must be allowed for time served in a detention center or for home arrest time already served.

A probationer is entitled to elapsed time credit absent “a specific demonstration of a ‘record or recollection of the violations.’” *Jardee*, ¶ 10 (patterns of criminal behavior insufficient to deny elapsed time credit). For a sentencing court to deny elapsed time credit, the record or recollection of the PO must contain “an actual violation by the defendant, in the relevant time period.” *Jardee*, ¶ 11. Should a court not grant elapsed time credit, it “must ‘state the reasons’ . . . based upon the record or recollection of the [PO].” *Jardee*, ¶ 11.

Here, that is exactly what the district court did. During its oral pronouncement, the district court noted Johnson’s ongoing failure to enter and complete an anger management program. That, in conjunction with the court’s observations about Johnson’s repeated, inappropriate, and violent behaviors towards his significant others and while incarcerated, was sufficient to support the

court's order denying Johnson elapsed time credit for all but 10 days.³ The district court's determination is supported by this Court's holdings in *Jardee* and *Johnson*.

In *Jardee*, this Court affirmed the court's decision to deny elapsed time credit for the period during which Jardee continuously misrepresented his address and lived with a person not approved by his PO. *Jardee*, ¶ 12. The district court's reliance on Jardee's admission during the revocation proceedings that he was not honest with his PO about where he was living was sufficient to satisfy Mont. Code Ann. § 46-18-203(7), notwithstanding the sentencing court's limited analysis for denying elapsed time credit.

In *Johnson*, although he had agreed to comply with intervention sanctions, including a requirement that he complete a period of continuous supervision in Alpha House, Johnson failed to comply with those sanctions. *Johnson, supra*. The record also demonstrated that Johnson failed to meaningfully participate in treatment. *Id.* This Court held the district court did not err by denying elapsed time credit because Johnson acknowledged failing to comply with a condition prior to the period at issue and declined to take proactive steps to comply with other conditions. *Johnson*, ¶ 25. This Court rejected Johnson's argument that to deny

³Since Johnson's failure to enter an anger management program also occurred during the first ten days of his reimposed suspended sentence, the record supported denial of all elapsed time credit. However, the State and the PO asserted Johnson was entitled the ten days of elapsed time, so it was not unreasonable for the court to award elapsed time credit for those ten days.

elapsed time credit there must be evidence of continuous violations. *Id.* Despite being repeatedly involved in conflicts with others that resulted in several criminal charges, Johnson failed to take any steps to enter an anger management program like the probationer in *Johnson*.

Like in *Johnson* and *Jardee*, Johnson's failure to attend anger management was an ongoing violation of his suspended sentence. In contrast, the facts here are distinguishable from this Court's holdings in *State v. Pennington*, 2022 MT 180, 410 Mont. 104, 517 P.3d 894, and *State v. Gudmundsen*, 2022 MT 178, ¶ 14, 410 Mont. 67, 517 P.3d 146.

In *Pennington*, this Court reversed the denial of elapsed time credit. *Pennington, supra*. Pennington admitted drinking 335 days after her sentence was imposed, but made no admissions to violating her sentence prior to that relapse. *Id.* This Court found the district court erred by not granting elapsed time credit for those 335 days as the record was devoid of any violations. Similarly, in *Gudmundson*, this Court reiterated its holding in *Jardee* that denying elapsed time credit based on references to "repeated violations of terms and conditions without a connection to the claimed period," was reversible error. *Gudmundsen*, ¶ 13.

Johnson's admission that he failed to sign up for, or pursue, any anger management program constituted evidence of "an actual violation by the

defendant” during the “relevant time period.” *Jardee*, ¶ 11. The district court did not err in denying more than ten days of elapsed time credit because the record contained “specific violations during the times in question” based on Johnson’s own admission that he was out of compliance. *Johnson*, ¶¶ 24-25 (citing *Gudmundsen*, ¶ 14).

While *Jardee* precludes denial of elapsed time credit based on a pattern of non-complying behaviors, it does not prohibit denial of elapsed time credit when the probationer has failed to participate in a specific treatment program as ordered by the sentencing court. Each day that Johnson failed to enroll, participate, and/or complete an anger management program, he was violating the specific sentencing condition nos. 32 and 33. Thus, it was not necessary, as Johnson does on appeal, for the district court to examine each day, or time period, between his arrests for committing new offenses or violating the conditions of his release.

Just as in *Johnson*, ¶ 29 n.3, the district court here was “clearly enmeshed in the process” of detailing why Johnson was not entitled to elapsed time credit as evidenced by its thorough explanation for the reasons for disposition. The court described the connection between Johnson’s failure to engage in anger management (ongoing violation of specific condition of his sentence) with his repeated failures to conduct himself as a good citizen (conduct sufficient to be charged with several offenses, many of which were violent; failure to adhere to

conditions of release) and Johnson's irate and inappropriate behavior at the revocation hearing.

The district court adhered to the statutory mandates of Mont. Code Ann. § 46-18-203(7) when it entered findings based on the record and recollections of the PO to justify denying more than ten days of elapsed time credit. *Johnson*, ¶ 12. Johnson's sentence falls within applicable statutory parameters and is a legal sentence. *Johnson*, ¶ 12.

CONCLUSION

The district court's dispositional order should be affirmed.

Respectfully submitted this 29th day of July, 2024.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Katie F. Schulz
KATIE F. SCHULZ
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,499 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ *Katie F. Schulz*

KATIE F. SCHULZ

CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-29-2024:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Scott D. Twito (Govt Attorney)
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Michael Marchesini (Attorney)
555 Fuller Ave
Helena MT 59601
Representing: Kathan Devernon Johnson
Service Method: eService

Jacob Andrew Yerger (Govt Attorney)
217 North 27th Street
Billings MT 59101
Service Method: eService
E-mail Address: jyerger@yellowstonecountymt.gov

Electronically signed by Wendi Waterman on behalf of Kathryn Fey Schulz
Dated: 07-29-2024